THE WARRANDICES IMPLIED IN THE SALE OF A CLAIM TO PAYMENT

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INTRODUCTION

A sale transaction governed by the Scots common law is comprised of two stages: (1) the contract and (2) the conveyance.[1] At the contract stage, the parties agree to transfer the property for a price.[2] Personal rights and obligations are acquired at this stage.[3] The conveyance is the point at which the real right of ownership is transferred from seller to buyer.[4]

At each stage of the sale transaction, there may be implied guarantees of title and quality. In Scots legal parlance, these guarantees are referred to as "warrandices". Our knowledge of the content of the warrandices implied in sale transactions varies depending on the type of property involved. We know a reasonable amount about the content of the warrandice of title in sale transactions for corporeal immoveable and corporeal moveable property.[5] We are familiar with the content of the warrandice of quality in sale transactions for corporeal moveable property.[6] On the other hand, the content of the warrandice of quality in sale transactions for corporeal immoveable property is a mystery.[7] The content of the implied warrandices can also vary between different stages of the sale transaction. For example, part of the title warrandice in a contract of sale for corporeal immoveable property is that the seller gives good and marketable title. At the conveyance stage, the title warrandice is that the seller warrants against eviction.[8]

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[1] Stair, III, 2, 3.

[2] *Baron David Hume's Lectures, 1786–1822*, edited by G. Campbell H. Paton (Edinburgh: Stair Society, 1939–1958), II, 3.

[3] *Gibson v Hunter Home Designs Ltd*, 1976 S.C. 23, per Lord President Emslie at 27.

[4] Erskine, II, 1, 18; Stair, III, 2, 5.

[5] See: Bankton, I, 19, 24; Mungo P. Brown, *A Treatise on the Law of Sale* (Edinburgh: W. & C. Tait, 1821), p.240; Bell, *Principles*, s.114; *Baron David Hume's Lectures, 1786–1822* (1939–1958), II, 38ff; *Urquhart v Halden* (1835) 13 S. 844; *Swan v Martin* (1865) 3 Macp. 851.

[6] *Baird v Pagan* (1765) Mor. 14240 (Kames' report); *Ralston v Robertson* (1761) Mor. 14238; Bankton, I, 19, 2; *Baron David Hume's Lectures, 1786–1822* (1939–1958), II, 40ff; Brown, *A Treatise on the Law of Sale* (1821), p.285.

[7] Robert Black, "Practice and Precept in Scots Law", 1982 Jur. Rev. 31, 48; Jack M. Halliday, "The Scope of Warrandice in Conveyances of Land", 1983 Jur. Rev. 1; Douglas J. Cusine, "Warrandice and Latent Defects in Heritage" 1983 J. Law Soc. Sc. 228; David A.O. Edward, "Latent Defect in Heritable Property", 1963 C.R. 144; Kenneth G.C. Reid, "Warrandice in the Sale of Land" in Douglas J. Cusine (ed.), *A Scots Conveyancing Miscellany* (Edinburgh: W. Green, 1987), p.164; *Aberdeen Development Co v Mackie, Ramsay & Taylor*, 1977 S.L.T. 177, per Lord Maxwell at 181.

[8] The distinction is discussed in Kenneth G.C. Reid, "Transfer of Ownership" in Robert Black et al (eds), *Stair Memorial Encyclopaedia*, 18, 707–708.

Of the different types of property that can be the subject of a sale transaction, we know least about the warrandices implied in the context of incorporeal property. Legal sources, both past and present, do not comprehensively discuss the warrandices implied in sales of such property. Existing discussions focus almost exclusively on the warrandices implied in the sale of a claim.[9] Even here, the treatment is problematic: the law in this area is old, the discussions brief and sometimes inconsistent.

To address the shortfall, this article provides a study of the warrandices implied in the sale of a claim. Through an analysis of case law and academic texts, I explore the development of the warrandices, its substantive content and scope. Before proceeding, readers should note that the literature does not clarify which stage of the sale transaction the warrandice discussed relates to. I will address this matter later on in the article. For now, it is enough to bear this ambiguity in mind while reading the analysis below.

Debitum subesse: the warrandice of title

Scots law sources describe the title warrandice implied in the sale of a claim in different ways. The bond assigned in *Waitch v Darling*[10] was found to contain an implied warrandice of fact and deed.[11] This is an exception. All other sources identify the implied warrandice as being either *debitum subesse*[12]; or both *debitum subesse* and fact and deed.[13]

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[9] For examples, see: Allan Menzies, *Conveyancing According to the Law of Scotland: Being the Lectures of the Late Allan Menzies*, edited by James S. Sturrock, 4th edn (Edinburgh: Bell & Bradfute, 1900), pp.177, 275; Alexander M. Bell, *Lectures on Conveyancing: Volumes I and II*, 3rd edn (Edinburgh: Bell & Bradfute, 1882), 215, 304; Bankton, II, 3, 125.

[10] *Waitch v Darling* (1621) Mor. 16573.

[11] See also Robert Bell, *A Treatise on the Conveyance of Land to a Purchaser, and on the Manner of Completing His Title*, edited by William Bell, 3rd edn (Edinburgh: W. Tait, 1830), p.70. Note, that it is unclear if he is speaking of an implied or an express warrandice.

[12] Bell, *Commentaries*, I, 644; John P. Wood, *Lectures Delivered to the Class of Conveyancing in the University of Edinburgh: Session 1892–1893 to Session 1899–1900* (Edinburgh: Bell & Bradfute, 1903), p.581; Ross G. Anderson, *Assignation* (Edinburgh: Edinburgh Legal Education Trust, 2008), para.9-03; William M. Gloag, *The Law of Contract: A Treatise on the Principles of Contract in the Law of Scotland*, 2nd edn (Edinburgh: W. Green, 1929), p.314; William Forbes, *A Great Body of the Law of Scotland* (Glasgow: University of Glasgow, Special Collections, circa 1714–1739), MS GEN 1247, folio 538; Erskine, II, 3, 25; Bell, *Principles*, s.1469; William A. Wilson, *The Scottish Law of Debt*, 2nd edn (Edinburgh: W. Green, 1991) p.289.

[13] *Riddell v Whyte* (1706) Mor. 16615; Menzies, *Conveyancing According to the Law of Scotland: Being the Lectures of the Late Allan Menzies* (1900), p.275; Bell, *Lectures on Conveyancing: Volumes I and II* (1882), p.215; John M. Halliday, *Conveyancing Law and Practice in Scotland*, edited by Iain J.S. Talman, 2nd edn (Edinburgh: SULI; W. Green, 1996), Vol.1, p.199; John Burns, *Conveyancing Practice According to the Law of Scotland,* edited by Farquhar MacRitchie, 4th edn (Edinburgh: W. Green, 1957), p.688; John Burns, *Handbook of Conveyancing*, 5th edn (Edinburgh: W. Green, 1938), p.29; J. Robertson Christie, "Warrandice" in John Chisholm (ed.), *Green's Encyclopaedia of the Law of Scotland*, 2nd edn (Edinburgh: W. Green, 1914), Vol.12, p.589; John Craigie, *Digest of the Scottish Law of Conveyancing: Moveable Rights*, 2nd edn (Edinburgh: Bell & Bradfute, 1894), p.239.

Debitum subesse guarantees that the claim exists,[14] is valid,[15] and due to the cedent by the debtor at the time of the assignation.[16] Warrandice *debitum subesse* is equivalent to the absolute warrandice implied in the sale of lands.[17] Both absolute warrandice and warrandice *debitum subesse* provide a general guarantee that the buyer's right is absolutely good.

Fact and deed warrandice is a concept familiar to us from the transfer of land. This warrandice relates only to personal conduct, guaranteeing that the granter has neither done, nor will do, anything to prejudice the title given.[18] In the sale of lands, fact and deed warrandice is commonly given by sellers acting in a representative capacity, such as trustees or executors.

In a sale of lands, absolute warrandice includes fact and deed warrandice. That is, absolute warrandice guarantees against past and future acts of the granter *and* any third parties. Similarly, an implied warrandice of both *debitum subesse* and fact and deed does not present a contradiction. The guarantee that the claim exists, is valid and due to the cedent, covers any past or future acts of the seller that prejudice the buyer's title. Thus, warrandice *debitum subesse* encapsulates a guarantee of fact and deed.[19]

The warrandice of quality

The debtor's solvency

In early Scots law, the seller of a claim also impliedly guaranteed the debtor's solvency. This is detailed in the report for a 1671 case in *Brown's Supplement*:

> "Of old absolute warrandice in an assignation to debts did import that the debtor was sufficient and responsal; and in case it could not be got of the

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[14] Wood, *Lectures Delivered to the Class of Conveyancing in the University of Edinburgh: Session 1892–1893 to Session 1899–1900* (1903), p.581; Bell, *Lectures on Conveyancing: Volumes I and II* (1882), p.215; Craigie, *Digest of the Scottish Law of Conveyancing: Moveable Rights* (1894), p.239; Burns, *Conveyancing Practice According to the Law of Scotland* (1957), p.688; Halliday, *Conveyancing Law and Practice in Scotland* (1996), Vol.1, p.199; Menzies, *Conveyancing According to the Law of Scotland: Being the Lectures of the Late Allan Menzies* (1900), pp.177, 275; Gloag, *The Law of Contract: A Treatise on the Principles of Contract in the Law of Scotland* (1929), p.314.

[15] Bell, *Lectures on Conveyancing: Volumes I and II* (1882), p.216; Halliday, *Conveyancing Law and Practice in Scotland* (1996), Vol.1, p.199; Gloag, *The Law of Contract: A Treatise on the Principles of Contract in the Law of Scotland* (1929), p.314. Note that the stipulation as to validity also extends to any cautionary obligations, see *Reid v Barclay* (1879) 6 R. 1007.

[16] *Ferrier v Graham's Trustees* (1826) 6 S. 818, per Lord Glenlee at 822; Bell, *Lectures on Conveyancing: Volumes I and II* (1882), p.215; Burns, *Conveyancing Practice According to the Law of Scotland* (1957), p.688; Craigie, *Digest of the Scottish Law of Conveyancing: Moveable Rights* (1894), p.239; Burns, *Handbook of Conveyancing* (1938), p.29; Halliday, *Conveyancing Law and Practice in Scotland* (1996), Vol.1, p.199; Anderson, *Assignation* (2008), para.9-03.

[17] The same view is expressed in: *White v Fyfe* (1683) Mor. 16607; Bell, *Lectures on Conveyancing: Volumes I and II* (1882), p.216; Bankton, II, 3, 125; Bell, *Principles*, s.1469.

[18] Erskine, II, 3, 26.

[19] The reverse is not true. Fact and deed warrandice is a lesser guarantee and does not encapsulate warrandice *debitum subesse*.

> debtor, then the assigner was liable in warrandice to make it good; but now of late the Lords have found . . . it signifies no more but that no other body has a better right to that sum than I . . . and that it is a true debt."[20]

Exactly when this position was reversed, is unclear. A 1632 case[21] questioned whether solvency was impliedly guaranteed, but the parties settled the matter privately. In his discussion of the case, Spottiswoode cites Romanist precedent to argue that sellers do not impliedly guarantee the debtor's solvency.[22] However, it is unclear whether he is expressing an opinion or reiterating established law.

Ross and Menzies both date the change in law to 1671.[23] The shift in law certainly began with three cases around this time period. The decisions in *Hay v Nicolson*,[24] *Barclay of Pearstoun v Liddel*[25] and *Clunies v McKenzie*[26] found that the debtor's solvency was not impliedly warranted. A contemporaneous case, *Stuart v Melvill*[27] contradicted these decisions. In *Stuart*, the bench found a clause of warrandice at all hands imported the solvency of the debtor; however, solvency was presumed unless the debtor was a "notour bankrupt" or the assignee could not recover through diligence.[28] The decision in *Stuart* highlights a level of confusion between the old law and the new law.

The precedent set by *Hay, Barclay* and *Clunies* prevailed in the long term. An assignation of a claim, even for onerous causes, does not impliedly guarantee the debtor's solvency.[29] Furthermore, neither an express clause of absolute

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[20] *Anent Warrandice in an Assignation* (1671) 2 Brown's Supp. 519.

[21] *Macklonaquhen v Carsan* (1632) Mor. 830. See also Sir Robert Spottiswoode, *Practicks of the Laws of Scotland*, edited by John Spotiswoode (Edinburgh: James Watson, 1706), p.21.

[22] *Macklonaquhen v Carsan* (1632) Mor. 830. See also Spottiswoode, *Practicks of the Laws of Scotland* (1706), p.21.

[23] Walter Ross, *Lectures on the History and Practice of the Law of Scotland: Volumes I and II*, 2nd edn (Edinburgh: Bell & Bradfute, 1822), p.193; Menzies, *Conveyancing According to the Law of Scotland: Being the Lectures of the Late Allan Menzies* (1900), p.275.

[24] *Hay v Nicolson* (1664) Mor. 16586. This case involves a gratuitous alienation.

[25] *Barclay of Pearstoun v Liddel* (1671) Mor 16591; 2 Brown's Supp. 589.

[26] *Clunies v McKenzie* (1672) Mor. 16595.

[27] *Stuart v Melvill* (1678) 2 Stair 611.

[28] *Stuart v Melvill* (1678) 2 Stair 611 at 612.

[29] Stair, II, 3, 46; Forbes, *A Great Body of the Law of Scotland* (1714–1739), folio 538; Erskine, II, 3, 25; Bell, *Principles*, s.1469; Bell, *Commentaries*, I, 644; John S. More, *Lectures on the Law of Scotland*, edited by John McLaren (Edinburgh: Bell & Bradfute, 1864), Vol.1, p.156; Menzies, *Conveyancing According to the Law of Scotland: Being the Lectures of the Late Allan Menzies* (1900), pp.177, 275; Wood, *Lectures Delivered to the Class of Conveyancing in the University of Edinburgh: Session 1892–1893 to Session 1899–1900* (1903), p.581; Bell, *Lectures on Conveyancing: Volumes I and II* (1882), pp.215, 304; Craigie, *Digest of the Scottish Law of Conveyancing: Moveable Rights* (1894), p.42; Macvey Napier, *Lectures on Conveyancing* (Private Collection of Professor Kenneth Reid, 1833–1834), p.201, lecture 17; Halliday, *Conveyancing Law and Practice in Scotland* (1996), Vol.1, p.199; Burns, *Handbook of Conveyancing* (1938), p.29; Christie, "Warrandice" in *Green's Encyclopaedia of the Law of Scotland* (1914), Vol.12, p.589; Gloag, *The Law of Contract: A Treatise on the Principles of Contract in the Law of Scotland* (1929), p.314; Wilson, *The Scottish Law of Debt* (1991), p.289; Reid, "Transfer of Ownership" in *Stair Memorial Encyclopaedia*, 18, 717.

warrandice[30] nor a warranty that the sums would be "good, valid and effectual"[31] extends to a guarantee of the debtor's solvency. These words do not constitute an express guarantee of the debtor's solvency.

It is by no means certain that the rule that the debtor's solvency is not impliedly guaranteed, applies to all claims to payment. It is clear that there is an implied warranty of the debtor's solvency in the transfer of a negotiable instrument.[32] Additionally, there is some ambiguity about whether or not the principle applies to transfers of heritably secured claims. Judgments in two early cases—one featuring the assignation of an annual rent[33] and the other an apprising[34]—found that there was an implied warranty of solvency in assignations of heritably secured claims. These decisions contrast with a third in which the assignation of a comprising[35] was found "to warrant only the validity of the comprising, and the reality of the debt".[36] It bears noting that these three decisions occurred in the same two decade period as *Hay, Barclay* and *Clunies*. As such, the inconsistency may be symptomatic of confusion between the old principle and the new, emerging principle.

The doctrine that the debtor's solvency is not impliedly guaranteed in the sale of a claim originates in Roman law. Justinian's *Digest* contains two passages outlining the principle. Ulpian explains: "when a debt is sold . . . subject to contrary agreement, the vendor is not answerable for the debtor's solvency but only for the fact that he is a debtor".[37] Paul concurs

> "indeed, even without the reservation, 'subject to contrary agreement'. But if he be stated to owe a specific sum, the vendor will be liable for that sum; if he be liable for a nonspecific debt or for nothing, he will be liable for the purchaser's damages".[38]

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[30] *Barclay of Pearstoun v Liddel* (1671) Mor. 16591; 2 Brown's Supp. 589; *Clunies v McKenzie* (1672) Mor. 16595; Forbes, *A Great Body of the Law of Scotland* (1714–1739), folio 538; Bankton, II, 3, 125; John Russell, *Theory of Conveyancing*, 2nd edn (Edinburgh: John Russell, 1791), p.175; Menzies, *Conveyancing According to the Law of Scotland: Being the Lectures of the Late Allan Menzies* (1900), p.177; Bell, *Lectures on Conveyancing: Volumes I and II* (1882), pp.216, 304; Halliday, *Conveyancing Law and Practice in Scotland* (1996), Vol.1, p.199. This is understandable, since absolute warrandice deals with the guarantee of title, while the debtor's solvency is a qualitative issue.

[31] *Barclay of Pearstoun v Liddel* (1671) Mor 16591; 2 Brown's Supp. 589; Bell, *Lectures on Conveyancing: Volumes I and II* (1882), p.216.

[32] Bell, *Principles*, s.1469.

[33] *Burd v Reid* (1675) Mor. 16602. An annual rent is a yearly rent attached to a piece of land.

[34] *Fyfe v White* (1683) Mor. 16607. Defined in Erskine, II, 12, 1 as "the sentence of a sheriff . . . by which the heritable rights belonging to the debtor were sold for payment of the debt due to the appriser, redeemable by the debtor within the term indulged by the law."

[35] A comprising is the same as an apprising. See Erskine, II, 12, 1.

[36] *Bowie v Hamilton* (1666) Mor. 16587.

[37] Ulpian, D.18.4.4. See also Johannes Voet, *The Selective Voet: Being the Commentary on the Pandects*, Translation by Percival Gane (Durban: Butterworths, 1955–58), para.XVIII.4.14; Hugo Grotius, *The Jurisprudence of Holland*, Translation by Robert W. Lee (Oxford: Clarendon Press, 1926), Vol.1, para.III.14.12.

[38] Ulpian, D.18.4.5. See also Voet, *The Selective Voet: Being the Commentary on the Pandects* (1955–58), para.XVIII.4.14.

Multiple Scottish sources[39] cite these passages in support of Scots law's adoption of the doctrine. Nor was Scots law alone in adopting this Romanist principle. According to the French Civil Code, the seller of "a claim or any other incorporeal right" does not impliedly guarantee the debtor's solvency.[40] Until recently, the German Bürgerliches Gesetzbuch contained similar provisions.[41]

An analysis of the exclusion of the debtor's solvency

The matter of the debtor's solvency is a quality issue, rather than a title issue. Say Amos lends £3,000 to Bea in December 2012, and sells the claim to Sid in September 2013. Bea is declared insolvent in October 2013, and cannot pay Sid as a result. Bea's insolvency does not affect the title to the claim. The title is good: the claim exists, is valid and was owed by Bea to Amos at the time of the assignation.

Bea's insolvency does affect the *quality* of the claim bought by Sid. Though Sid's title to the claim is good, Bea's insolvency means he will find it difficult to secure full payment from her. The Scots common law and the Sale of Goods Act 1979 provide guidance on determining whether the subject of the contract of sale is qualitatively defective. A test suggested by both sources is whether the thing is unfit for its ordinary purposes.[42] The ordinary purpose of a claim for £3,000 is payment of £3,000 to the creditor. By this measure, Sid's claim is unfit for its ordinary purposes, and thus qualitatively defective.

Gaps in the literature render it impossible to determine whether or not there is a general implied warranty of quality in the sale of a claim, either at the contract or the conveyance stage of the transaction. It should be noted that the rule that the debtor's solvency is not impliedly guaranteed does not necessarily indicate the absence of an implied warranty of quality in the sale of a claim. There are compelling reasons for excluding the debtor's solvency from any implied warranty of quality. Furthermore, the debtor's solvency is only one type of qualitative defect.

Rationalising the exclusion of the debtor's solvency

Scots law excludes the debtor's solvency from the implied warrandice because the seller has no means of knowing the debtor is insolvent until insolvency is declared. The judgment in *Barclay* extrapolates:

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[39] *Barclay of Pearstoun v Liddel* (1671) Mor 165912; 2 Brown's Supp. 589; Stair, II, 3, 46; Erskine, II, 3, 25; Forbes, *A Great Body of the Law of Scotland* (1714–1739), folio 538; The passage is also cited by Spottiswoode, in his report of *Mackclonaquhen* (Spottiswoode, *Practicks of the Laws of Scotland* (1706), p.21).

[40] French Civil Code art.1694 (both the 1804 and current versions).

[41] Bürgerliches Gesetzbuch paras 437, 438. Note as a result of subsequent amendments, these provisions no longer exist. Readers who wish to consult these provisions should see: Ian S. Forrester, Simon L. Goren and Hans-Michael Ilgen, *The German Civil Code, As Amended to January 1, 1975* (Amsterdam/Oxford: North-Holland Publishing Co, 1975).

[42] Sale of Goods Act 1979 s.14(2B)(a); *Ralston v Robb* (1808) F.C.M. App 1 Sale No.6; *Baron David Hume's Lectures, 1786–1822* (1939–1958), II, 42; Brown, *A Treatise on the Law of Sale* (1821), p.288.

> "If it were interpreted otherwise, it would be the seed of infinite pleas, and would prove impracticable, seeing debtors being merchants or their fortunes not consistent in land-rent, they dying or becoming bankrupt long after the assignation, it were impossible for the cedent to discover the true condition of their fortune, and to balance the same with their debts, which might be latent the time of the assignation."[43]

Roman law[44] and the Scots common law[45] recognised an implied warranty of quality in certain contracts of sale. Under both systems, this warranty held the seller liable for undisclosed latent qualitative defects regardless of whether or not he had known of them.[46] The approach was justified on the basis that, prior to the sale, the seller is in a better position to discover any hidden defects.[47] The buyer has less chance of discovering a latent defect prior to the sale: he relies, to an extent, on the seller's vigilance and honesty. The seller takes a smaller risk than the buyer; and for that reason, liability for latent qualitative defects is placed on his shoulders.

This reasoning does not apply to the matter of the debtor's solvency in the sale of a claim. Even a vigilant seller has no means by which to discover the true state of his debtor's finances prior to a declaration of insolvency. Both seller and buyer are in equal positions in regard to the debtor's solvency. An implied warranty of the debtor's solvency would place an onerous burden on sellers. Such a burden would disrupt commerce by deterring people from selling claims.[48]

An additional argument exists against holding the seller impliedly liable for the debtor's insolvency post-intimation. Once intimation occurs, only the buyer can apply for payment. As the buyer has sole control over when payment is applied for, he should also bear the risk of the debtor becoming insolvent in the period between intimation and application for payment.[49] French law recognizes this principle in relation to express guarantees of the debtor's solvency. Article 1695 of the Civil Code stipulates that such guarantees relate only to "the present solvency, and [do] not extend to the future [unless expressly stipulated]". Forbes's *Great Body* expresses the same sentiment.[50]

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[43] *Barclay of Pearstoun* v. *Liddel* (1671) Mor. 165912 at 16594.

[44] See Ulpian, D.21.1.1.1; D.21.1.38.

[45] See *Ralston v Robertson* (1761) Mor. 14238.

[46] Ulpian, D.21.1.1.2; *Ralston v Robertson* (1761) Mor. 14238; *Ewart v Hamilton* (1791) Hume 667; *Duthie v Carnegie* (1815) 18 *Faculty Decisions* 162; Forbes, *A Great Body of the Law of Scotland* (1714–1739), folio 832; *Baron David Hume's Lectures, 1786–1822* (1939–1958), II, 42–43.

[47] Ulpian, D.21.1.1.2; *Ralston v Robertson* (1761) Mor. 14238; Forbes, *A Great Body of the Law of Scotland* (1714–1739), folio 832; *Baron David Hume's Lectures, 1786–1822* (1939–1958), II, 43; Brown, *A Treatise on the Law of Sale* (1821), p.304; *Dickson v Kincaid* (1808) F.C. 58.

[48] Forbes, *A Great Body of the Law of Scotland* (1714–1739), folio 538.

[49] This argument was made by the defender in *Barclay of Pearstoun v Liddel* (1671) 2 Brown's Supp. 589 at 590.

[50] Forbes, *A Great Body of the Law of Scotland* (1714–1739), folio 538.

Other qualitative defects in claims to payment?

There are valid reasons for excluding an implied guarantee of the debtor's solvency in the sale of a claim to payment without excluding a general implied warranty of quality. However, in practice, it is difficult to see what such a warranty would address, if not the matter of the debtor's solvency. Latent qualitative defects can be physical or non-physical,[51] but they are usually of the former kind. Since claims to payment lack a physical presence, they rarely suffer from qualitative defects. Most defects affecting claims to payment tend to be title issues.

This is likely to be the case even where the claim relates to corporeal property. Take the example of a car purchased by Y from Z. Z subsequently sells the right to payment of the price to M. However, when M applies for payment, Y refuses. He claims that the car is defective within the meaning of s.14 of the Sale of Goods Act 1979. He successfully terminates the sale. In this example, there is a latent defect in quality in relation to the ancillary property (i.e. the car). However, when analysed in the context of the sale of the claim to payment, the defect is one of title. The claim does not exist, and M does not have any title to it as a result. M's inability to secure payment is a breach of the implied warrandice that the claim exists, is valid and due.

The plea of compensation could perhaps be categorised as a latent qualitative defect in a claim to payment, though I am skeptical of this. Where there is concourse of debit and credit between two parties, and one of the parties subsequently assigns his claim, the other party is entitled to plead compensation against the assignee.[52] This is best illustrated with an example. Ellen lends Scarlett £4,000 in March 2010. In July 2010, Scarlett does some freelance work for Ellen, and issues an invoice for £1,000 on 29 July 2010. So Scarlett owes Ellen £4,000; and Ellen separately owes Scarlett £1,000. Both claims are due, but neither has been settled when Ellen sells her claim to Melanie in October 2010. When Melanie applies to Scarlett for payment, Scarlett pleads compensation. The court sustains this plea on 1 January 2011 and Scarlett only pays Melanie £3,000. Whether this creates a title defect or a qualitative defect depends on our interpretation of the legal status of Melanie's claim once compensation has been successfully pleaded. Note that compensation is triggered through a formal process in Scots law: to have effect, it must be pleaded in court and sustained.[53]

If the effect of the sustained plea is that it allows Scarlett to *suspend* payment of the portion of Melanie's claim over which there is concourse with Scarlett's

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[51] An example of a non-physical qualitative defect in Scots law is a horse which was a poor worker—*McBey v Reid* (1842) 4 D. 349. Examples of non-physical defects in Roman law include a runaway slave, Ulpian, D.21.1.1.1; D.21.1.17; and a suicidal slave, Ulpian, D.21.1.21.3.

[52] *Shiells v Ferguson, Davidson and Co* (1876) 4 R. 250; Erskine, III, 4, 14; *Baron David Hume's Lectures, 1786–1822* (1939–1958), III, 44–45.

[53] Bell, *Principles*, s.575; William W. McBryde, *The Law of Contract in Scotland*, 3rd edn (Edinburgh: SULI; W. Green, 2007), para.20-64; Anderson, *Assignation* (2008), para.8-44.

claim against Ellen, then the plea of compensation creates a latent qualitative defect. On this interpretation, Melanie still has a valid, existing claim for £4,000 against Scarlett. However, Scarlett is allowed to treat the unpaid debt of £1,000 owed to her by Ellen, as partial payment of the debt of £4,000 she owes Ellen or any subsequent assignee of Ellen's. The crucial point, is that were Ellen to subsequently settle Scarlett's claim against her, Melanie would be entitled to receive the £1,000 that Scarlett previously held back. Thus, on this interpretation, Melanie still owns a claim for £4,000, but the principles of compensation and *assignatus utitur jure auctoris*[54] mean that she will only receive £3,000 in payment. This would be a latent qualitative defect: the ordinary purpose of a claim for £4,000 is payment of £4,000 to the creditor, so Melanie's claim is unfit for its ordinary purposes and qualitatively defective as a result.

I am unconvinced by this argument. On another interpretation, compensation does not suspend the claim in question, but rather, *functions to discharge it*. Erskine and Bell describe compensation as extinguishing both claims[55] "from the moment of concourse".[56] On a literal interpretation, this means that Ellen's claim for £4,000 against Scarlett existed at the time it was sold to Melanie, and when Melanie subsequently applied to Scarlett for payment. However, these facts change on 1 January 2011, when the court sustains Scarlett's plea of compensation. At this point, the claim for part of the £4,000 *retroactively ceased to exist* from the moment Scarlett invoiced Ellen for £1,000. Thus, the effect of the sustained plea of compensation is that on 29 July 2010 (the point at which there was concourse of debit and credit), Scarlett's claim against Ellen for £1,000 ceased to exist, cancelled out by part of Ellen's claim against Scarlett for £4,000. So on 28 July 2010, Ellen had a claim against Scarlett for £4,000; but from 29 July 2010 onwards, Ellen's claim against Scarlett was only for £3,000. Thus, though Ellen contracted to sell a claim for £4,000 to Melanie, she only had title to a claim for £3,000. This appears to me to be a partial breach of the implied warrandice of title, specifically, the guarantee that the claim exists.

At the start of this section, I indicated that the exclusion of an implied guarantee of the debtor's solvency does not equate to a general exclusion of an implied warranty of quality in the sale of a claim to payment. This is true. However, it is also true that the debtor's insolvency is probably the only qualitative defect that could affect a claim to payment. Thus, in purely practical terms, Scots law's rejection of an implied guarantee of the debtor's solvency is effectively a rejection of the implied warranty of quality in sales of claims to payment.

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[54] The principle that "all exceptions competent against the cedent before the assignation or intimation, are relevant against the assignee". See: Stair, III, 1, 20.

[55] Bell, *Principles*, s.1411; Erskine, III, 4, 11; Bankton, III, 24, 20.

[56] Bell, *Principles*, s.572; Erskine, III, 4, 12. Note that both claims are fully extinguished only if they were equal. If they were unequal, the obligations are only extinguished "in so far as there is concourse of debit and credit" (see Erskine, III, 4, 11).

WHICH STAGE OF THE SALE TRANSACTION DOES THE WARRANDICE RELATE TO?

The exact ambit of the warrandices discussed above is unclear. Sources do not indicate whether the discussions pertain to the contract stage, the conveyancing stage, or both stages of the sale transaction. The locations of discussions on the warrandices in academic texts allow us to infer that they applied to the conveyancing stage; however, it is not possible to establish whether or not the warrandices also applied to the contract stage.

Almost all of the academic texts discuss the warrandices implied in claims to payment in the context of the conveyance. The conveyancing texts place the passages relating to the warrandices in either the chapter on assignations[57] or the chapter on deeds.[58] The discussions in Stair and Erskine occur in the chapter on infeftment of property.[59] Bankton locates his discussions in the titles on assignation[60] and fees.[61] Bell's *Principles* discusses the warrandices in the section on "Written Transference of Moveables".[62]

The exceptions are the discussions in Bell's *Commentaries* and More's *Lectures*. Bell's *Commentaries* discusses the warrandices implied in claims to payment in the chapter on warrandice, within the book entitled "Of Creditors by Personal Obligation or Contract". Of all the texts, only More's *Lectures* mentions the warrandices within the discussion on the contract of sale.[63] Notably, Brown's *Treatise on the Law of Sale* does not mention the warrandice *debitum subesse* at all; and this is despite references to several cases involving incorporeal property[64] in the chapter on the warrandice of title. Likewise, Brown's discussion of the implied warranty of quality does not allude to the exclusion of an implied guarantee as to the debtor's solvency in the sale of a claim to payment. The discussion on the warrandice of title

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[57] e.g. Menzies, *Conveyancing According to the Law of Scotland: Being the Lectures of the Late Allan Menzies* (1900), p.266; Wood, *Lectures Delivered to the Class of Conveyancing in the University of Edinburgh: Session 1892–1893 to Session 1899–1900* (1903) p.581; Bell, *Lectures on Conveyancing: Volumes I and II* (1882), p.304; Craigie, *Digest of the Scottish Law of Conveyancing: Moveable Rights* (1894), p.239.

[58] e.g. Menzies, *Conveyancing According to the Law of Scotland: Being the Lectures of the Late Allan Menzies* (1900), p.176; Bell, *Lectures on Conveyancing: Volumes I and II* (1882), p.215; Craigie, *Digest of the Scottish Law of Conveyancing: Moveable Rights* (1894), p.42; Burns, *Handbook of Conveyancing* (1938), p.29; Halliday, *Conveyancing Law and Practice in Scotland* (1996), Vol.1, p.199.

[59] Erskine, II, 3, 2; Stair, II, 3, 46.

[60] Bankton, III, 1.

[61] Bankton, II, 3.

[62] Bell, *Principles*, s.1469.

[63] More, *Lectures on the Law of Scotland* (1864), Vol.1, p.156.

[64] e.g. Brown, *A Treatise on the Law of Sale* (1821), pp.249, 267. The cases cited are *Plenderleith v Representatives of the Earl of Tweeddale and the Duke of Queensferry,* (1800) Mor. 16639 (involves teinds and illustrates the point that warrandice does not extend to future augmentations of stipend, unless this is expressly stated); and *Inglis v Anstruther and the Representatives of Anstruther* (1771) Mor. 16633 (involves the granting of a commission and relates to the question of whether expenses can be claimed if eviction does not occur).

in contracts of sale in Bell's *Principles* cites a case involving incorporeal property[65]; however, the warrandice in sales of claims to payment is not mentioned. Instead, a reference to a discussion elsewhere in the book is supplied.

The fact that almost all discussions of the warrandices implied in claims to payment occur in the context of the conveyance, suggests that the warrandices applied to the conveyancing stage of the sale transaction. This does not rule out the possibility that the principles discussed also applied to the contract of sale. Many of the discussions on the warrandices pre-date Savigny's abstract theory of transfer; and pre-Savigny,[66] it was possible for a principle derived in relation to one stage of the sale transaction to be considered applicable to the other stage as well.

While the warrandices discussed above may also have applied to the contract of sale, we cannot know this for certain. There are too many gaps in the literature. With the exception of More's *Lectures*, discussions on the contract of sale do not mention the warrandices implied in the context of incorporeal property, either specifically in relation to claims to payment, or more generally.

Likewise, the terminology used provides no help. Academic texts on the warrandices implied in claims to payment tend to refer to the "assignation of debts or bonds".[67] However, this is inconclusive. While the term "assignation" technically denotes the transfer stage in sales of incorporeal property, it can also be used to describe "the contract to assign".[68] Thus, the terminology used does not allow us to conclude that the warrandices discussed above were limited to the conveyance.

Debitum subesse in the wider context?

The introduction to this article noted that Scots law sources do not, in general, discuss the warrandices implied in sales of incorporeal property. The warrandices implied in the sale of a claim to payment is an exception. This begs the following question: do the implied warrandices discussed in relation to claims extend to other types of incorporeal property?

The sources do not give us a clear answer. The old case law relating to the warrandice *debitum subesse* deals with assignations of bonds.[69] Likewise, most academic texts discuss the warrandices in the context of claims to payment. There are some exceptions, however. Erskine's discussion mentions "debt[s], decreet[s]

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[65] Bell, *Principles*, s.122. The reference is to *Plenderleith v Representatives of the Earl of Tweeddale and the Duke of Queensferry,* (1800) Mor. 16639.

[66] Savigny's abstract theory was first propounded in the mid-nineteenth century. In Scots law however, the pre-Savigny period is considerably more recent, and is better termed as "pre-Reid and Gretton". See discussion in Reid, "Transfer of Ownership" in *Stair Memorial Encyclopaedia*, 18, 608, 609, 611.

[67] e.g. Erskine, II, 3, 2; Bankton, III, 1, 28; Bell, *Principles*, s.1469.

[68] Anderson, *Assignation* (2008), para.1-07.

[69] For example: *Barclay of Pearstoun v Liddel* (1671) Mor 16591, 2 Brown's Supp. 589; *Clunies v McKenzie* (1672) Mor. 16595; *Ferrier v Graham's Trustees* (1826) 6 S. 818, per Lord Glenlee at 822; *Reid v Barclay* (1879) 6 R. 1007.

or other personal right[s]"[70]; the judgment in *Barclay v Liddel* refers to "bond[s], decreet[s] or other deed[s] assigned"[71]; Burns' discussion relates to the sale of a debt "or other personal right"[72]; More applies the warrandices to "debt[s] or personal claim[s]"[73]; and the wording in Wood's discussion suggests that the warrandices apply beyond claims to other incorporeal moveable property.[74]

My view is that with the exception of shares, the warrandices discussed above are not relevant to contracts of sale for other types of incorporeal property. The content of the warrandice of title—that the claim exists, is valid and due to the cedent—is relevant only in relation to contracts of sale for claims to payment and shares. There is some evidence in support of my view in what little we know of the implied warrandice of title in the transfer of a patent. In the assignation of a patent, the implied warrandice *does not* include a guarantee as to the patent's validity.[75] This indicates that the title warrandice implied in the sale of a patent was not warrandice *debitum subesse*. Likewise, the matter of the debtor's solvency is not pertinent to sales of incorporeal property aside from shares and claims to payment. The debtor's solvency is not, for example, relevant to sales of copyright, patents or computer software.

Conclusion

This article examined the content and scope of the warrandice implied in the sale of a claim under Scots law. In doing so, it made four broad points. Firstly, the title warrandice in this context is *debitum subesse*. Warrandice *debitum subesse* is equivalent to the absolute warrandice in the sale of land; and extends to a guarantee that the claim exists, is valid and due to the cedent by the debtor at the time of the assignation.

Secondly, little is known of the exact content and scope of the implied warrandice of quality. In early Scots law, sellers impliedly guaranteed the debtor's solvency; but this position was reversed through a series of cases in the late seventeenth century. The rule that the debtor's solvency is not implied guaranteed does not constitute a general exclusion of an implied warrandice of quality in the sale of a claim to payment. In practical terms however, the debtor's solvency is the only qualitative defect that could afflict a claim to payment.

Thirdly, we can be certain that the principles discussed above applied to the conveyancing stage of the sale transaction. Whether or not they also applied to the contract stage, is undeterminable. Finally, the rules of warrandice discussed above are only relevant to sales of claims to payment, and shares: they should not be read as extending to other types of incorporeal property.

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[70] Erskine, II, 3, 25.
[71] *Barclay of Pearstoun v Liddel* (1671) Mor 16591 at 16594.
[72] Burns, *Handbook of Conveyancing* (1938), p.29.
[73] More, *Lectures on the Law of Scotland* (1864), Vol.1, p.156.
[74] Wood, *Lectures Delivered to the Class of Conveyancing in the University of Edinburgh: Session 1892–1893 to Session 1899–1900* (1903), p.581.
[75] Bell, *Principles*, s.1355.